Supreme Court, U.S.
FILED
051598 JUN 14 2006
OFFICE OF THE CLERK

No.

IN THE

Supreme Court of the United States

THE TOKIO MARINE & FIRE INSURANCE COMPANY, LTD., A CORPORATION, PETITIONER

v.

YUMI ITO, AN INDIVIDUAL ON BEHALF OF HERSELF AND ON BEHALF OF THE PEOPLE OF THE STATE OF CALIFORNIA (FOR THE BENEFIT OF THE INTERNAL REVENUE SERVICE AND THE CALIFORNIA FRANCHISE TAX BOARD)

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

TIMOTHY M. THORNTON, JR.
Counsel of Record
NELSEN, THOMPSON, PEGUE & THORNTON
A Professional Corporation
2425 Olympic Blvd.,
Suite 4000 W
Santa Monica, CA 90404
(310) 315-1001

CURRY & TAYLOR ♦ WASH D.C. ♦ (202) 393-4141 ♦ USSCINFO.COM

QUESTION PRESENTED

Whether the Ninth Circuit's erroneous decision to reverse the district court's decision to dismiss an action, on the ground of forum non conveniens, by a United States citizen against a Japanese insurer for its alleged bad faith handling of an insurance claim arising from an automobile accident that occurred in Japan, which claim arose under a policy of insurance issued in Japan by a Japanese insurer, to a Japanese national, insuring a risk (automobile liability) in Japan, conflicts with decisions of other circuits with respect to the standard of proof, violates public policy, and ignores concerns of comity?

PARTIES TO THE PROCEEDING

Pursuant to Rule 29.6, Petitioners state as follows:

The Petitioner is Tokio Marine and Nichido Fire Insurance Co., Ltd., successor by merger to Tokio Marine and Fire Insurance Co., Ltd., is a Japanese corporation, which is a wholly owned subsidiary of Millea, Inc. Millea, Inc. is a Japanese corporation which publicly trades in Japan and in the U.S.A. No publicly held company owns 10% or more of the stock of Millea, Inc.

TABLE OF CONTENTS

Page

QUESTION PRESENTED i

PARTIES TO THE PROCEEDING ii

TABLE OF AUTHORITIES iii

OPINIONS BELOW 1

JURISDICTION 1

RELEVANT PROVISIONS INVOLVED 1

STATEMENT 1

REASONS FOR GRANTING THE PETITION 4

CONCLUSION 18

APPENDIX

Circuit Court Opinion 1a

District Court Order 7a

Order Denying Rehearing 20a

Relevant Provisions Involved 21a

TABLE OF AUTHORITIES

Page

CASES

ALCOA STEAMSHIP CO. v. M/V NORDIC REGENT, 654 F.2D 147, 149 (2D CIR. 1980) (EN BANC), CERT. DENIED, MOTION GRANTED, 449 U.S. 890, 101 S. CT. 248, 66 L. ED. 2D 116 (1980), REH'G DENIED, 449 U.S. 1103, 101 S. CT. 902, 66 L. ED. 2D 831 (1981), REH'G DENIED, 450 U.S. 1050, 101 S. CT. 1772, 68 L. ED. 2D 247 (1981) 7

BMW OF NORTH AMERICA, INC. v. GORE, 517 U.S. 559, 571-72, 116 S. CT. 1589, 134 L. ED. 2D 809 (1996) 15

CALAVO GROWERS OF CAL. v. GENERALI BELGIUM, 632 F.2D 963, 965-66 (2D CIR. 1980), CERT. DENIED, 449 U.S. 1084, 101 S. CT. 871, 66 L. ED. 2D 809 (1981), REH'G DENIED, 451 U.S. 934, 101 S. CT. 2012, 68 L. ED. 2D 321 (1981) 7

CAMPBELL v. STATE FARM MUT. AUTO. INS. CO., 2004 UT 34, 98 P.3D 409, 498 UTAH ADV. 23 (2004), CERT. DENIED, STATE FARM MUT. AUTO. INS. CO. v. CAMPBELL, 543 U.S. 874, 125 S. CT. 114, 160 L. ED. 2D 123 (2004) 15

DELOITTE & TOUCHE LLP v. DIRIENZO, 537 U.S. 1028, 123 S. CT. 556, 154 L. ED. 2D 442 (2002) 8

DENHAM v. FARMERS INS. CO., 213 CAL. APP. 3D 1061, 1066, 262 CAL. RPTR. 146 (1989) 13

DIRIENZO v. PHILIP SERVS. CORP., 294 F.3D 21 (2D CIR. 2002) 8

FIELDS v. SEDGWICK ASSOCIATED RISK, LTD., 796 F.2D 299 (9TH CIR. 1986) 12, 13

FORD v. BROWN, 319 F.3D 1302, 1308 (11TH CIR. 2003) 6, 17

HARTFORD FIRE INS. CO. v. CAL., 509 U.S. 764, 818-819, 113 S.CT. 2891, 2921, 125 L.ED. 612 (1993) 11

HOWE v. GOLDCORP INVESTMENTS, LTD., 946 F.2D 944, 950-951(1ST CIR. 1991), CERT. DENIED, 502 U.S. 1095, 112 S.CT. 1172, 117 L. ED. 2D 418 (1992) 7, 18

MISKOW v. BOEING CO., 664 F.2D, 205, 208 (9TH CIR. 1981), CERT. DENIED, 455 U.S. 1020, 102 S. CT. 1717, 72 L. ED. 2D 138 (1982) 9

PEOPLE v. UNITED NATIONAL LIFE INS. CO., 66 CAL.2D 577, 427 P.2D 199, 58 CAL.RPTR. 599 (1967) 13

PIPER AIRCRAFT CO. v. REYNO, 454 U.S. 235, 257, 102 S.CT. 252, 265, 70 L.ED.2D 419 (1981) ..... *passim*

SOCIÉTÉ NATIONALE INDUSTRIELLE AÉROSPATIALE v. UNITED STATES DISTRICT COURT, 482 U.S. 522, 543-544, N. 27, 107 S. CT. 2542, 2556, N. 27, 96 L. ED. 2D 461 (1987) 10, 11

STATE FARM MUTUAL AUTOMOBILE INSURANCE v. CAMPBELL, 538 U.S. 408, 421, 123 S.CT. 1513, 1522, 155 L.ED.2D 585, 603 (2003) 14, 15

UNITED NAT'L LIFE INS. CO. v. CALIFORNIA, 389 U.S. 330, 88 S. CT. 506, 19 L. ED. 2D 562(1967) 13

WHITE v. FORD MOTOR CO., 312 F.3D 998, 1013-14 (9TH CIR. 2002), AMENDED, REH'G DENIED, 335 F.3D 833 (9TH CIR. 2003) 335 F.3D 833 (9TH CIR. 2003) 15

STATUTES

15 U.S.C. §§ 1011-1015 12

28 U.S.C. SECTION 1254(1) 1

28 U.S.C. §§ 1441 AND 1332(a)(2) 13

Cal.Ins.Code §700(a) 13

Cal.Ins.Code § 790 12

Cal.Ins.Code § 790.02 12

Cal.Ins.Code § 1861.13 12

OPINIONS BELOW

The opinion of the Court of Appeals is unpublished and is reprinted in the Appendix to the Petition ("App.") at 1a-4a. The District Court's opinion is unpublished and is reprinted at App. 5a-12a.

JURISDICTION

The Ninth Circuit decision of the Court of Appeals was entered on January 25, 2006. The decision of the Court of Appeals denying Tokio Marine's petition for Ninth Circuit rehearing was entered on March 16, 2006. This Court has jurisdiction under 28 U.S.C. § 1254(1).

RELEVANT PROVISIONS INVOLVED

(see appendix)

STATEMENT

The Ninth Circuit failed to accord appropriate deference to the district court's decision. Though it acknowledged the abuse of discretion standard, it nonetheless substituted its own judgment for that of the District Court, which it may not do. *Piper Aircraft Co. v. Reyno*, 454 U.S. 235, 257, 102 S.Ct. 252, 265, 70 L.Ed.2d 419 (1981). More importantly, however, the Ninth Circuit's analysis conflicts with those of other circuits, since it disregarded access to evidence as a significant private interest factor. The decision creates public policy concerns, since the court of appeals imposed an incorrect standard of proof. The Ninth Circuit ignored considerations of comity in erroneously concluding that California has an interest in an insurance claim under a policy issued by a Japanese insurer, to a Japanese citizen

residing in Japan, on a risk (automobile liability) located in Japan, arising out of an automobile accident occurring in Japan. Finally, the Ninth Circuit's application of the standard of review differs from that of the First Circuit.

A. Factual Background

Respondent, and plaintiff in the proceedings below, Yumi Ito has been a naturalized American citizen since 1962 and a California resident since 1976. (App. 7a-8a) She was injured in an automobile accident in Japan in September 1995. (*Id.* at 8a) She was a passenger in an automobile driven by Mr. Onizuka, a Japanese citizen residing in Japan. (*Id.*) Tokio Marine, at the time of the accident, insured Mr. Onizuka and his automobile under a "voluntary" automobile liability insurance policy. (*Id.*) Mr. Onizuka also was insured with a "compulsory" or "CALI" automobile liability insurance policy issued by Dai Tokyo Insurance Company. (*Id.*)

From the time of the accident through July 1996, petitioner Tokio Marine paid respondent's medical costs incurred in Japan. (*Id.*) On several occasions, respondent was forced to interrupt her treatment in Japan with trips to California in order to renew her temporary visas. (*Id.*) In July 1996, respondent did not return to Japan, but remained in California in order to continue receive further medical treatment and to continue her recovery. (*Id.*) Tokio Marine agreed to pay her medical costs while she remained in California. Payments continued until August of 1997 when Tokio Marine requested information from respondent regarding her treatment. (*Id.*)

In January 2000 respondent sued Mr. Onizuka in Tokyo District Court in Japan ("*Ito v. Onizuka*").

Petitioner Tokio Marine intervened in respondent's lawsuit and participated in all aspects of the case. (*Id.* at 9a) Tokio Marine participated in settlement discussions and was included in the Articles of Settlement. (*Id.*)

In October 2003, Respondent sued Tokio Marine in California, asserting claims for reach of contract, breach of the implied covenant of **good** faith and fair dealing, fraud, novation, bad faith, and injunctive and restitutionary relief. (*Id.* at 8a) She filed the complaint in state court, but Tokio Marine removed the action to the United States District Court for the Central District of California on the basis of diversity jurisdiction. 28 U.S.C. §§ 1441 and 1332(a)(2). (*Id.*)

The vast majority of the witnesses in this action are located in Japan. (*Id.* at p. 12a). Tokio Marine disclosed thirty-three witnesses who are located in Japan and speak Japanese. (*Id.* at 13a). Respondent identified only herself, her son and two treating physicians as witnesses located in the United Stated. (*Id.*)

The bulk of the documents, namely documents relating to the 1995 car accident, respondent's post-accident hospitalization, the insurance policy, Tokio Marine's claim file, and the litigation and settlement in *Ito v. Onizuka*, are located in Japan and written in Japanese. (*Id.* at 13a) Only plaintiff's medical records for treatment received in the United States and her financial records are located in the United States. (*Id.*)

B. Proceedings Below

Tokio Marine moved to dismiss on the basis of forum non conveniens. The District Court dismissed the

case on that basis. Respondent appealed to the Ninth Circuit Court of Appeals. The Ninth Circuit reversed. Tokio Marine petitioned for rehearing, which the Circuit Court denied.

REASONS FOR GRANTING PETITION

A. The Court Of Appeals' Analysis Conflicts With Those Of Other Circuits, Since It Unreasonably Discounted Access to Evidence As A Significant Private Interest Factor

In reviewing the decision to dismiss, the court of appeals evaluates the lower court's decision under the standard of abuse of discretion, as follows:

> The *forum non conveniens* determination is committed to the sound discretion of the trial court. It may be reversed only when there has been a clear abuse of discretion; where the court has considered all relevant public and private interest factors, and where its balancing of these factors is reasonable, its decision deserves substantial deference. [Citations omitted]. *Piper Aircraft v. Reyno*, 454 U.S. at 257, 102 S.Ct. at 266.

The court of appeals acknowledged that the district court utilized the correct standard.

The Ninth Circuit found that the district court committed two errors: the district court (1) erroneously failed to place the burden of showing inconvenience upon the moving party, and (2) unreasonably balanced the private and public interest factors. The court of appeals

traced the errors to the district court's incorrect analysis of the nature of the claims before it.

The court of appeals' evaluation of the private interest factors reflects that it disregarded the element of access to evidence as a private interest factor and in doing so, its opinion is in conflict with decisions in other circuits.

The court of appeals reached a different conclusion from the district court because it characterized the claims differently. The court of appeals regarded the dispute as simply one between a citizen of the forum state and a foreign insurance company. The complaint does set forth claims which are typically asserted against an insurance company, and thus it is perhaps understandable how the court of appeals reached its conclusion. Because the court of appeals focused solely upon the alleged promise to pay benefits to the plaintiff in the United States, and found the circumstances of the underlying action to be irrelevant, it concluded that greater weight should have been placed upon plaintiff's citizenship, and thus the court of appeals rejected the manner in which the district court weighed the parties' interests.

In contrast to the appellate court, the district court understood that plaintiff's current claims are inseparable from events in Japan. The injuries which gave rise to the claims asserted now by plaintiff were caused by an automobile accident in Japan. After plaintiff was injured, Tokio Marine paid for her medical treatment in Japan pursuant to a Japanese insurance policy issued to the driver of the automobile in which plaintiff was a passenger at the time of the accident. Since plaintiff possessed only a temporary visa, she was unable to receive further treatment in Japan without interruption.

During periods of recovery and treatment, she was required to travel back and forth to obtain the necessary visa. Tokio Marine agreed to pay her expenses for medical care in the United States. All witnesses to both the insurance contract and the agreement alleged by plaintiff, except plaintiff, are Japanese, and all relevant documents are in Japan.

In addition, an issue central to plaintiff's right to recover from Tokio Marine is whether any claim survived the settlement of her liability lawsuit against the driver. Ms. Ito filed a liability action in Japan against the driver of the vehicle. Tokio Marine, as the driver's insurer, intervened in the underlying lawsuit and participated in the settlement. The scope of the settlement is thus material to this lawsuit.

Although the court of appeals was correct in noting that the facts of the automobile accident did not need to be relitigated, it was unreasonable in finding the underlying action to be unimportant to the trial of plaintiff's current claims. In keeping with its view that events in Japan were not important, court of appeals found that the district court should not have given weight to the fact that witnesses and evidence were located in Japan. Contrary to the Ninth Circuit's conclusion, however, access to evidence is considered the most important private interest factor. *See Ford v. Brown*, 319 F.3d 1302, 1308 (11th Cir. 2003) ("Perhaps the most important 'private interest' of the litigants is access to evidence.").

The district court's decision reflects that it considered the factual circumstances of plaintiff's claims and acknowledged that courts give substantial deference

to a plaintiff's choice of forum, especially when the plaintiff is a citizen and resident of the United States. However, the district court concluded that plaintiff's interest in selecting California as the forum was outweighed by the other factors, such as the location of witnesses and evidence. The district court's conclusion is supported by the record and case law. *See Howe v. Goldcorp Investments, Ltd.*, 946 F.2d 944, 950-951(1st Cir. 1991), *cert. denied*, 502 U.S. 1095, 112 S.Ct. 1172, 117 L. Ed. 2d 418 (1992) (affirming dismissal where most of background facts occurred in Canada and thus most of evidence and most of witnesses were in Canada); *Scottish Air Int'l, Inc. v. British Caledonian Group plc*, 81 F.3d 1224, 1233-34 (2d Cir. 1996) (affirming dismissal where all potential witnesses and most, if not all, of relevant documents were located in Great Britain); *Alcoa Steamship Co. v. M/V Nordic Regent*, 654 F.2d 147, 149 (2d Cir. 1980) (en banc), *cert. denied, motion granted*, 449 U.S. 890, 101 S. Ct. 248, 66 L. Ed. 2d 116 (1980), *reh'g denied*, 449 U.S. 1103, 101 S. Ct. 902, 66 L. Ed. 2d 831 (1981), *reh'g denied*, 450 U.S. 1050, 101 S. Ct. 1772, 68 L. Ed. 2d 247 (1981) (affirming dismissal of admiralty action where accident and damage occurred in Trinidad, repairs would take place in Trinidad, and witnesses, other than experts and ship's crew, were in Trinidad); *Calavo Growers of Cal. v. Generali Belgium*, 632 F.2d 963, 965-66 (2d Cir. 1980), *cert. denied*, 449 U.S. 1084, 101 S. Ct. 871, 66 L. Ed. 2d 809 (1981), *reh'g denied*, 451 U.S. 934, 101 S. Ct. 2012, 68 L. Ed. 2d 321 (1981) (affirming dismissal of breach of contract and fraud action where documents were located in Belgium and suit involved residents of Belgium, where contract was negotiated and allegedly breached in Belgium, and case implicated customs of insurance industry in Belgium and Europe at large); *compare DiRienzo v. Philip Servs. Corp.*, 294 F.3d 21 (2d

Cir. 2002), *cert. denied, sub nom. Deloitte & Touche LLP v. DiRienzo*, 537 U.S. 1028, 123 S. Ct. 556, 154 L. Ed. 2d 442 (2002) (no inconvenience where defendants failed to explain inability to transport documents from Ontario to New York, and witnesses could readily travel from Ontario).

The court of appeals erred because it ignored the significance of the location of witnesses and evidence as a private interest factor. In doing so, its decision conflicts with those of other circuits and is contrary to public policy.

B. Since The Court of Appeals Misinterpreted The Scope Of The Moving Party's Burden Of Proof, Its Decision Creates Public Policy Concerns

The Ninth Circuit stated that the district court failed to hold Tokio Marine to the correct burden of proof, since the district court did not require sufficient specificity of proof. Again, the issue arose because of the court of appeals had erroneously concluded that events in Japan, including the circumstances and settlement of the Japanese liability action, had no bearing upon plaintiff's current lawsuit. The district court merely assumed that the Japanese witnesses would be material to plaintiff's lawsuit, and thus the district court erred in not requiring Tokio Marine to prove the materiality of such witnesses' testimony. (App. 4a)

The district court's decision reflects that it found the materiality of testimony of Japanese witnesses and documents to be established by plaintiff's own complaint.

(App. 14a) More importantly, however, the burden of proof imposed by the court of appeals raises substantial public policy concerns. This Court has rejected the standard of requiring actual proof from a moving party. A moving party is not required to submit affidavits which identify the testimony that witnesses will provide at trial. Such a high level of detail is unnecessary As this Court explained in *Piper Aircraft*:

> The Court of Appeals found that the problems of proof could not be given any weight because Piper and Hartzell failed to describe with specificity the evidence they would not be able to obtain if trial were held in the United States. It suggested that defendants seeking *forum non conveniens* dismissal must submit affidavits identifying the witnesses they would call and the testimony these witnesses would provide if the trial were held in the alternative forum. Such detail is not necessary. [Footnote omitted.]

Piper Aircraft v. Reyno, 454 U.S. at 258, 102 S.Ct. at 267.

The Ninth Circuit relied upon *Miskow v. Boeing Co.*, 664 F.2d, 205, 208 (9th Cir. 1981), *cert. denied*, 455 U.S. 1020, 102 S. Ct. 1717, 72 L. Ed. 2d 138 (1982), for its interpretation of the "clear showing" standard. The *Miskow* decision was decided before *Piper Aircraft* and thus does not take into account this Court's analysis regarding the level of proof necessary to obtain dismissal. In addition, the *Miskow* decision provides no guidance, since, without providing its reasoning, the court of appeals simply states its conclusion that the district court had abused its discretion.

Accordingly, the Ninth Circuit's analysis reflects a mistaken understanding of the burden of proof imposed on a party moving to dismiss on the grounds of forum nonconveniens. If this Court does not grant review, the mistaken view will be perpetuated.

C. The Ninth Circuit Ignored Principles of Comity in Analyzing the Public Interest Factors

In its analysis of the public interest factors, the Ninth Circuit failed to acknowledge the extent of Japan's interest in this dispute or the significance of the prior lawsuit in Japan. In doing so, the court of appeals ignored principles of comity. "Comity refers to the spirit of cooperation in which a domestic tribunal approaches the resolution of cases touching the laws and interest of other sovereign states." *Société Nationale Industrielle Aérospatiale v. United States District Court*, 482 U.S. 522, 543-544, n. 27, 107 S. Ct. 2542, 2556, n. 27, 96 L. Ed. 2d 461 (1987).

"Comity" is the respect sovereign nations afford each other by limiting the reach of their laws.

> Under the Restatement [(Third), of The Foreign Relations Law of the United States], a nation having some "basis" for jurisdiction to prescribe law should nonetheless refrain from exercising that jurisdiction "with respect to a person or activity having connections with another state when the exercise of such jurisdiction is unreasonable." Restatement (Third) § 403(1). The "reasonableness" inquiry turns on a number of factors including, but not limited to: "the extent to

> which the activity takes place within the territory [of the regulating state]," *id.*, § 403(2)(a); "the connections, such as nationality, residence, or economic activity, between the regulating state and the person principally responsible for the activity to be regulated," *id.*, § 403(2)(b); "the character of the activity to be regulated, the importance of regulation to the regulating state, the extent to which other states regulate such activities, and the degree to which the desirability of such regulation is generally accepted," *id.*, § 403(2)(c); "the extent to which another state may have an interest in regulating the activity," *id.*, § 403(2)(g); and "the likelihood of conflict with regulation by another state," *id.*, § 403(2)(h). *Hartford Fire Ins. Co. v. Cal.*, 509 U.S. 764, 818-819, 113 S.Ct. 2891, 2921, 125 L.Ed. 612 (1993) (Scalia dissenting).

The court of appeals disregarded concerns of comity. It overemphasized the extent of California's interest and, in addition, devalued the nature of Japan's interest. The court of appeals disagreed with the district court because it did not acknowledge the significance of events in Japan.

Respondent's claim also attacks the conduct and position of petitioner in the litigation in Japan. If the prior lawsuit had been litigated in the United States and in California, this attack would raise constitutional issues relating to Tokio Marine's right to petition under the United States Constitution - and that of California. Inasmuch as it addresses conduct in litigation in Japan, it raises substantial issues of comity and conflict of laws, public interest factors under the forum non conveniens

analysis. These factors support the district court's dismissal.

1. *The Ninth Circuit Overemphasized, And Thereby Distorted, The Extent Of California's Interest In This Litigation*

In its decision, the court of appeals relied upon *Fields v. Sedgwick Associated Risk, Ltd.*, 796 F.2d 299 (9th Cir. 1986), for the proposition that "'California has a strong interest in providing an effective means of redress for its residents when their insurers refuse to pay claims.' [Citation omitted.]" (App. 5a) In *Fields*, however, the court actually found that exercise of personal jurisdiction was unreasonable.

In this case, California does not have an interest that outweighs the interests of Japan. California has an interest in regulating claims practices in California. Cal.Ins.Code § 790 (Thompson West 2006) ("The purpose of this article is to regulate trade practices in the business of insurance in accordance with the intent of [the McCarran-Ferguson Act, 15 U.S.C. §§ 1011-1015] by defining, or providing for the determination of, all such practice *in this State* which constitute unfair methods of competition or unfair or deceptive acts or practices . . . .") (Emphasis added.); Cal.Ins.Code § 790.02 ("No person shall engage *in this State* in any trade practice which is defined in this article as . . . an unfair method of competition or an unfair or deceptive act or practice in the business of insurance.") (Emphasis added). California requires rate approval on policies insuring risk or operations *in California*. Cal.Ins.Code § 1861.13 (Emphasis added). An insurer must be "admitted", or

licensed, to transact "any class of insurance business *in this state* . . .." Cal.Ins.Code §700(a) (Emphasis added); *see People v. United National Life Ins. Co.*, 66 Cal.2d 577, 427 P.2d 199, 58 Cal.Rptr. 599 (1967), *appeal dismissed by, United Nat'l Life Ins. Co. v. California*, 389 U.S. 330, 88 S. Ct. 506, 19 L. Ed. 2d 562(1967) (holding that California can constitutionally regulate insurance transactions of out-of-state insurance companies which solicit and negotiate life insurance by mail with California residents, even though the insurers have no agents in California). The extent of California's interest is to regulate the business of insurance in California, not in other states and certainly not in other countries.

Insurance in Japan is regulated under the Insurance Business Law (Law No. 105 of June 7, 1995), Cabinet Order for Enforcement of Insurance Business Law, Ordinance for Enforcement of Insurance Business Law and Rulings of the Ministry of Finance, which are now the Guidelines of the Financial Supervisory Agency. Japan thus has an interest in regulating insurers on a comprehensive basis, just as California regulates insurers with respect to policies issued in California. *See Denham v. Farmers Ins. Co.*, 213 Cal. App. 3d 1061, 1066, 262 Cal. Rptr. 146 (1989).

The Ninth Circuit noted in *Fields v. Sedgwick* that "England surely has a strong interest in resolving a claim by a British subject against English defendants arising from an English insurance policy. We find that adjudicating this dispute in California rather than England would be unreasonable." *Id.*, 796 F.2d at 303. Likewise, here, Japan has a strong interest is resolving a claim by a frequent U.S. business visitor to Japan, against a Japanese defendant, arising from an accident occurring

in Japan, covered by a Japanese insurance policy.

Furthermore, California law conflicts with Japanese law in permitting recovery of punitive damages. A punitive damage award will not be recognized under Japanese law because such an award is considered inconsistent with Japanese public orders and good morals. Supreme Court, judgment, 11 July 1997: 51 Minshu (6) 2530 [1997] *Mansei Kogyo Co., Ltd., et al. v. Northern 1*, an Oregon partnership (Judicial decisions. 2) (US judgment which granted punitive damages [which concept is not adopted in Japan] is incompatible with the public order of Japan and that such judgment cannot be effective or enforceable in Japan under Japan Code of Civ.P. art. 118).

Plaintiff Ito's efforts to have a federal district court sanction conduct by a Japanese insurer in Japan with regard to an auto accident claim in Japan exceed the reach of California law, for the following reasons:

> A State cannot punish a defendant for conduct that may have been lawful where it occurred. [Citations omitted]. Nor, as a general rule, does a State have a legitimate concern in imposing punitive damages to punish a defendant for unlawful acts committed outside of the State's jurisdiction. Any proper adjudication of conduct that occurred outside Utah to other persons would require their inclusion, and, to those parties, the Utah courts, in the usual case, would need to apply the laws of their relevant jurisdiction. [Citation omitted.]. *State Farm Mutual Automobile Insurance v. Campbell*, 538 U.S. 408, 421, 123 S.Ct. 1513, 1522, 155 L.Ed.2d 585, 603 (2003), *on remand at, judgment entered by*

Campbell v. State Farm Mut. Auto. Ins. Co., 2004 UT 34, 98 P.3d 409, 498 Utah Adv. 23 (2004), *cert. denied, State Farm Mut. Auto. Ins. Co. v. Campbell*, 543 U.S. 874, 125 S. Ct. 114, 160 L. Ed. 2d 123 (2004).

The Supreme Court also noted that principles of federalism are also implicated in this analysis. *State Farm*, 538 U.S. at 421-22, 123 S.Ct. at 1522-23; *see also White v. Ford Motor Co.*, 312 F.3d 998, 1013-14 (9th Cir. 2002), *amended, reh'g denied*, 335 F.3d 833 (9th Cir. 2003) (Because no single state can impose its own policy choice on neighboring states, a state may not impose economic sanctions on violators of its laws with the intent of changing the tortfeasors' lawful conduct in other states) (*quoting BMW of North America, Inc. v. Gore*, 517 U.S. 559, 571-72, 116 S. Ct. 1589, 134 L. Ed. 2d 809 (1996)). This is equally if not more true in the case of conduct in another nation.

2. The District Court Correctly Found That Japan's Interest In This Litigation Outweighs California's Interest

Notwithstanding the fact that plaintiff purports to assert claims arising under California law, the district court recognized, correctly, that California's interest in this litigation is slight in comparison to Japan's. In its analysis of the public interest factors, the district court properly considered the interest in having the trial of a diversity case in a forum that is at home with the law that must govern the action in order to avoid unnecessary problems in conflict of laws or in the application of foreign law. *Piper Aircraft v. Reyno*, 454 U.S. at 241, n. 6, 102

S.Ct. at 259, n. 6.

The district court rejected plaintiff's efforts to isolate her claims from the events in Japan to be unpersuasive, finding her claims to be directly related to events in Japan, namely, the car accident, the medical treatment received in Japan, defendant's obligations to plaintiff under the insurance policy, the settlement in the Japanese litigation, and any promises made to plaintiff by defendant. (App. 16a) Accordingly, the district court concluded that there was minimal United States' interest apart from the American plaintiff.

In addition, the district court found that choice of law considerations weighed in favor of dismissal. (App. 17a) The court noted that Japanese law would need to be applied to numerous aspects of this action, as follows:

> [I]t is clear Japanese law will need to be applied, at a minimum, with respect to the settlement of Ito v. Onizuka and the applicability, if any, of Japan's Automobile Accident Compensation Law to the facts of this case. [Footnote omitted.] See Declaration of Hiosi Nakane, Esq., Pars. 4-9. Because Japanese courts are more competent at interpreting and applying Japanese law, this factor weighs in favor of dismissal. [Citation omitted.] Accordingly, the public interest factors favor dismissal. [Citation omitted.] (*Id.*)

Thus, it was correct for the district court to exercise its discretion in favor of dismissal. The district court thereby avoided potential problems in conflict of law, which would arise from the application of California law to a Japanese insurance policy and to Japanese insurance claims handling practice (which involves considerations of both determination of tort liability under Japanese law and application of a Japanese insurance policy).

Each system, California and Japan, is a relatively integral legal whole. Insurance is heavily regulated in both jurisdictions. It is unreasonable to assume that California's interest takes precedence over Japan's. In exercising its discretion in favor of dismissal, the district court paid due regard to concerns of comity. *See Ford v. Brown*, 319 F.3d 1302, 1309 (district court overlooked important comity concerns in refusing to dismiss). The Ninth Circuit, in contrast, unreasonably ignored Japan's interest.

The Ninth Circuit premised its holding in part on a perceived California interest in what is, fundamentally, a Japanese insurance claim. In doing so, it was substituting its own judgment for that of the District Court. And it was ignoring substantive concerns of conflict of laws and comity, which supported the District Court's exercise of discretion in dismissing the case for forum non conveniens.

D. The Ninth Circuit Applied The Standard of Review Differently From the First Circuit

The Ninth Circuit articulated the correct standard of review, but applied the standard in a fashion at variance with the First Circuit. *See Howe v. Goldcorp Investments, Ltd*, 946 F.2d 944. That case concerned a claim by an investor against a Canadian corporation. All communications originated in and came from Canada to the investor. *Id.* at 951. Just as the court there was within its discretion to dismiss, so too the District Court here was within its discretion to dismiss, notwithstanding Tokio Marine's communications with Ms. Ito initially in Japan, and later from Tokio Marine personnel in Japan to Ms. Ito in California when she returned there. While the Second Circuit upheld an order of dismissal in *Howe v. Goldcorp*, the Ninth Circuit reversed an order of dismissal here.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

TIMOTHY M. THORNTON, JR.
NELSEN, THOMPSON, PEGUE & THORNTON
A Professional Corporation
2425 Olympic Blvd., Suite 4000 W
Santa Monica, California 90404
(310) 315-1001

(any footnotes trail end of each document)

No. 04-55145

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

YUMI ITO, an individual on behalf of herself and on behalf of the People of the State of California (for the benefit of the Internal Revenue Service and the California Franchise Tax Board),
Plaintiff - Appellant,

v.

TOKIO MARINE & FIRE INSURANCE COMPANY, LTD., a corporation,
Defendant - Appellee.

November 17, 2005, Argued and Submitted, Pasadena, California

January 25, 2006, Filed

NOTICE: RULES OF THE NINTH CIRCUIT COURT OF APPEALS MAY LIMIT CITATION TO UNPUBLISHED OPINIONS. PLEASE REFER TO THE RULES OF THE UNITED STATES COURT OF APPEALS FOR THIS CIRCUIT.

COUNSEL: For YUMI ITO, an individual on behalf of herself and on behalf of the People of the State of California (for the benefit of the Internal Revenue Service and the California Franchise Tax Board), Plaintiff - Appellant: Robert A. Miller, Esq, La Crescenta, CA.; Samuel P. Britton, Esq., Costa Mesa,

CA.; Michael E. Bubman, Esq., HORGAN ROSEN BECKMAN & COREN LLP, Calabasas, CA.

For TOKIO MARINE & FIRE INSURANCE COMPANY, LTD., a corporation, Defendant - Appellee: Timothy M Thornton, Esq., NELSEN THOMPSON PEGUE AND THORNTON, Santa Monica, CA.

JUDGES: Before: HUG, SILER**, and WARDLAW, Circuit Judges.

OPINION: MEMORANDUM *

Yumi Ito appeals the district court's dismissal for *forum non conveniens* of her action for breach of contract, breach of the implied covenant of good faith and fair dealing, and fraud against Tokio Marine and Fire Ins. Co., Ltd. (Tokio). Because we conclude that the district court abused its discretion by erroneously failing to place the burden of showing inconvenience on Tokio and unreasonably balancing the private and public interest factors, we reverse and remand. Having reweighed the factors under a correct application of the law, we hold that Tokio's claim of *forum non conveniens* is without merit, and that California is the appropriate forum.

1. As a preliminary matter, the district court committed two errors, which tainted its analysis of the private and public interest factors. First, the district court misapprehended the nature of the claims before it. For example, the district court stated that "this action arises out of injuries Plaintiff suffered" in a 1995 Japanese car accident. To the contrary, this action

arises from Tokio's breach of its 1996 agreement to pay for medical costs plaintiff incurred in the United States at Tokio's suggestion. Tokio's stated rationale for stopping medical payments was lack of information from Ito's United States physicians, an issue that does not require relitigation of the injuries sustained in the car accident.

Second, the district court improperly apportioned the burden of proof between the parties. Tokio, the party moving to dismiss for *forum non conveniens*, bore the burden of making a "clear showing" of facts that either "(1) establish such oppression and vexation of a defendant as to be out of proportion to the plaintiff's convenience, which may be shown to be slight or nonexistent, or (2) make trial in the chosen forum inappropriate because of considerations affecting the court's own administrative and legal problems." *Miskow v. Boeing Co.*, 664 F.2d 205, 208 (9th Cir. 1981) (internal quotation marks omitted). Without such a showing, the district court cannot assume that the movant's assertions establish inconvenience, as the district court did here.

2. Private Interest Factors. Contrary to established Supreme Court authority, the district court failed to give any deference to Ito's United States citizenship and choice of home forum. *See Piper Aircraft Co. v. Reyno*, 454 U.S. 235, 255, 102 S. Ct. 252, 70 L. Ed. 2d 419 (1981) ("[A] plaintiff's choice of forum is entitled to greater deference when the plaintiff has chosen the home forum."). Although the district court acknowledged that courts give substantial deference to a plaintiff's choice of forum, and included residence of the parties in its enumeration of private interest

factors, it did not actually weigh Ito's citizenship and choice of forum in its private interest analysis, focusing instead on Tokio's bare allegations of numerous Japanese witnesses and documents.

The court improperly relied on the number of witnesses located in Japan rather than assessing the materiality of their proposed testimony to the allegations in the complaint. *See Gates Learjet Corp. v. Jensen*, 743 F.2d 1325, 1335-36 (9th Cir. 1984) (reversing the district court's *forum non conveniens* dismissal in part because the district court "should have examined the materiality and importance of the anticipated witnesses' testimony and then determined their accessibility and convenience to the forum," rather than simply noting that 23 of the 44 witnesses were located in the alternative forum). In doing so, the court incorrectly failed to hold Tokio to its burden of proof. In fact, Tokio did not meet its burden because it failed to provide information about its proposed witnesses that would be sufficient to support a determination that the location of witnesses in Japan favors dismissal. The district court improperly assumed that Tokio's witnesses are material to the litigation.

The district court committed the same error by concluding that because the bulk of Tokio's documents referenced in its papers were located in Japan and written in Japanese, it would be more convenient to try the case there. Again, Tokio failed to provide specific information about the relevance and materiality of those documents, and therefore failed to meet its required burden.

3. Public Interest Factors. The district court improperly discounted the interests of California and the United States in the litigation. Ito seeks damages for breach of contract and for the tort of breach of the covenant of good faith and fair dealing. The injury caused by the alleged breaches were to a California state resident in California. We have recognized consistently that "California has a strong interest in providing a forum for its residents and citizens who are tortiously injured." *Dole Food Co. v. Watts*, 303 F.3d 1104, 1115-16; *see also Fields v. Sedgwick Associated Risks, Ltd.*, 796 F.2d 299, 302 (9th Cir. 1986) ("California has a strong interest in providing an effective means of redress for its residents when their insurers refuse to pay claims.") (internal quotation marks omitted). While Japan may have some interest in protecting its corporate insurers, that interest does not outweigh California's interest in protecting its citizens and ensuring that they are compensated for injuries occurring in California.

The district court also improperly analyzed the issue of court congestion by commenting on congestion in the Central District without considering whether Japan provided a speedier forum. In considering the administrative difficulties flowing from court congestion, "the real issue is not whether a dismissal will reduce a court's congestion but whether a trial may be speedier in another court because of its less crowded docket." *Gates Learjet*, 743 F.2d at 1337. The consideration of docket congestion in balancing the public interest factors is intended to weigh relative convenience; *forum non conveniens* "should not be used as a solution to court congestion." *Id.*

4. Because the district court failed to hold Tokio to its burden of making a clear showing of facts required to merit the "exceptional tool" of a *forum non conveniens* dismissal, *see Monegra v. Rosa*, 211 F.3d 509, 514 (9th Cir. 2000), and improperly balanced the private and public interest factors, it abused its discretion in ruling that Japan was a more convenient forum in which to pursue this action. Having reweighed the relevant factors under the applicable law, we hold that Japan is not a more convenient forum for this action and that Ito may pursue her action in the forum she selected.

REVERSED and REMANDED.

- - - - - - - - - - - - - - - Footnotes - - - - - - - - - - - - - - -

* This disposition is not appropriate for publication and may not be cited to or by the courts of this circuit except as provided by 9th Cir. R. 36-3.

** The Honorable Eugene E. Siler, Jr., Senior United States Circuit Judge for the Sixth Circuit, sitting by designation.

CV 03-6835-JFW (JTLx)
UNITED STATES DISTRICT COURT CENTRAL. DISTRICT OF CALIFORNIA

YUMI ITO, etc., et al.

-v-

TOKIO MARINE & FIRE INSURANCE COMPANY, LTD. etc.

HONORABLE JOHN F. WALTER, UNITED STATES DISTRICT JUDGE

ORDER GRANTING DEFENDANT'S MOTION TO DISMISS FOR FORUM NON CONVENIENS (filed October 20, 2003)

On October 20, 2003, Defendant The Tokio Marine & Fire Insurance Co., Ltd. ("Defendant") filed a Motion to Dismiss for Forum Non Conveniens. On December 2, 2003, Plaintiff Yumi Ito ("Plaintiff') filed her Opposition. On December 8, 2003, Defendant filed a Reply. Pursuant to Rule 78 of the Federal Rules of Civil Procedure and Local Rule 7-15, the Court finds that this mater is appropriate for decision without oral argument. The hearing calendared for December 17, 2003, is hereby vacated, and the matter taken off calendar. After considering the moving, opposing, and reply papers and the arguments therein, the Court rules as follows:

I. Facts and Procedural Background

On August 18, 2003, Plaintiff, a naturalized American

citizen since 1962 and California resident since 1976, filed her Complaint in Los Angeles Superior Court, alleging causes of action for breach of contract, breach of the implied covenant of good faith and fair dealing, fraud, novation, bad faith, and injunctive and restitutionary relief. Defendant, a Japanese corporation, filed an answer to the Complaint in Los Angeles Superior Court on September 22, 2003 and then removed the action to this Court on September 23, 2003. Defendant now seeks to stay or dismiss this action because Japan is a more convenient forum.

This action arises out of injuries Plaintiff suffered in a car accident in September 1995 in or around Fujinomyia City, Japan. Plaintiff was the passenger in a car driven by Mr. Onizuga, who had a "compulsory" (minimum) insurance policy, issued by Dai Tokyo Insurance, and a "voluntary" insurance policy, issued by Defendant. Plaintiff received emergency medical treatment at Fujinomyia City Hospital and further medical treatment at Osaka Seikime Hospital in Osaka, Japan. Plaintiff was hospitalized in Japan from approximately September 1995 through July 1996. During the period of Plaintiff's hospitalization in Japan, Defendant paid for all costs associated with Plaintiff's medical care. During this time period, Plaintiff was required to return periodically to the United States to reapply for a visitor's visa issued by the Japanese government. Defendant paid for all costs associated with these trips to the United States.

In July 1996, Plaintiff returned to Los Angeles for a visa re-issuance. Although Plaintiff anticipated returning to Osaka to continue her medical treatment and undergo further surgery to her leg, she remained in the United States because she accepted Defendant's offer to pay all

future costs of her treatment in California. Based on this agreement, Defendant would no longer be required to pay for trips by Plaintiff from Japan to the United States to renew her visa. Plaintiff was treated in the United States and was reimbursed $328,578.84 by Defendant for the treatment she received between July 1996 and August 1997. 0n August 21,1997, Defendant sent Plaintiff a letter stating that a question existed as to whether the treatment Plaintiff was then receiving was related to the injuries she suffered in the 1995 car accident. The letter also stated that Defendant required more detailed information about the treatment from the physician in charge before Defendant would pay for any additional medical treatment. Plaintiff contends her requests for further explanation of why payment had been discontinued were met with excuses, including the suggestion that her treating physicians were unqualified, and assurance that payments would resume once the problems were resolved.

On January 13, 2000, Plaintiff sued Messrs. Onizuka and Suzuki, the driver of the other car involved in the 1995 accident, in Tokyo District Court. Defendant, as one of Mr. Onizuka's insurers, intervened in the suit and participated in all aspects of the case. This case, Yumi Itc . Kunisuke Onizuka (Case No. 496(wa), 2000), was settled on February 13, 2003 and Defendant participated in the settlement discussions with the Court and was included in the Articles of Settlement. Declaration of Hiroshi Nakane, Esq., Exhs. D & F.

II. Standard

A party moving to dismiss an action on the grounds of forum non conveniens must demonstrate: (1) the

existence of an adequate alternative forum, and (2) that the balance of private and public interest factors favors dismissal. See Lockman Found. v. Evangelical Alliance Mission, 930 F.2d 764, 767 (9th Cir. 1991). Although courts give substantial deference to a plaintiffs choice of forum (especially when the plaintiff is a United States citizen), courts frequently find that the equities support dismissal an grounds of forum non conveniens. See PiperAircraft Co. v. Reyna, 454 U.S. 235, 256 n.23 ("A citizen's forum choice should not be given dispositive weight ...[I]f the balance of conveniences suggests that trial in the chosen forum would be unnecessarily burdensome for the defendant or the court, dismissal is proper.")

Ill. Discussion

A. Japan is an Adequate Alternative Forum.

When deciding whether to dismiss a case based on forum non conveniens, a court must first determine if there is an adequate alternative forum in which the plaintiff can bring her case. See Lockman, 930 F.2d at 768. Ordinarily, this requirement is satisfied if the defendant is amenable to process in the alternative forum and the alternative forum provides the plaintiff with a "sufficient remedy for [the other party's] wrong." See Dole Food Co. v. Watts, 303 F. 3d 1104, 1118 (9th Cir. 2002). Differences in court procedure in the alternative form, such as a lack of jury trials, do not necessarily render an alternative forum inadequate. See Lockman, 930 F.2d at 768.

Japan is clearly an adequate alternative forum. Defendant, as a Japanese corporation with its principal place of business in Tokyo, is subject to service of

process in Japan.[1] Moreover, despite the lack of jury trials and different discovery procedures in Japan, federal courts have consistently found that Japan is an adequate alternative forum to litigation in the United States. Lockman, 930 F.2d at 768. Plaintiff argues that this is one of the "rare circumstances" where, despite Defendant being amenable to process in Japan, Japan is an inadequate alternative forum because Japan does not recognize a cause of action for insurance bad faith.[2] See, e.g., Lueck v. Sundstrand Corp., 236 F.3d 1137, 1143 (9th Cir. 2001) (only in rare circumstances is remedy provided by alternative forum so clearly inadequate or unsatisfactory that it is no remedy at all).

However, Japan is an adequate alternative forum if some remedy for Plaintiff exists, even if Japan does not offer the same array of remedies or the same magnitude of potential recovery available in this Court. Creative Technology, Ltd. v. Aztech System PTE, Ltd., 61 F.3d 696, 743 (9th Cir. 1995) (because Singapore court "capable of offering [plaintiff] an adequate monetary or injunctive remedy," it was an adequate alternative forum even though territorial limits of Singapore Copyright Act prevented redress far infringement in United States); Lockman, 930 F.2d at 769 (possible unavailability of RICO and Lanham Act claims in Japanese court did not make it an inadequate forum because plaintiff could recover under tort and contract theories). Japan recognizes causes of action for contract and tort theories. Lockman, 930 F.2d at 769. In this case, the majority of Plaintiff's claims arise under contract (breach of contract, novation) and tort (fraud, breach of the implied covenant of good faith and fair dealing) theories.[3] Because some remedy for Plaintiff exists in Japan, Japan is an adequate alternative

forum.

B. The-Balance of Private and Public Interest Factors Support Dismissing This Action.

After a court determines that an adequate alternative forum is available, it must balance private and public interest factors to determine if equity, fairness and convenience weigh in favor of dismissing the case. See Piper Aircraft, 454 U.S. at 241.

1. The Private Interest Factors.

The private interest factors include: (1) the residence of the parties and witnesses; (2) the forum's convenience to the litigants; (3) access to physical evidence and other sources of proof; (4) whether unwilling witnesses can be compelled to testify; (5) the cost of bringing witnesses to trial; (6) the enforceability of the judgment;[4] and (7) all other factors that render trial of the case expeditious and inexpensive. Lueck, 236 F.3d at 1145 (citing Gulf Oil Corp. v. Gilbert, 330 U.S. 501, 508 (1947) and Contact Lumber Co. v. P. T. Moges Shipping Co., 918 F.2d 1446, 1449 (9th Cir. 1990)).

The private interest factors clearly weigh in favor of dismissal. The vast majority of the witnesses and evidence in this case are located in Japan. Creative Technology, 61 F.3d at 703 (in copyright action, dismissal upheld when design and manufacture of both parties' computer, software took place in Singapore, so that most of witnesses and documents located there, despite fact that plaintiff also complaining of defendant's distribution in U.S. of software allegedly in violation of plaintiff's U.S. copyright). For example, thirty-two of

the thirty-three witnesses listed by Defendant are located in Japan and speak Japanese. In contrast, Plaintiff has only herself, her son, and two treating physicians identified as witnesses located in the United States.[5] Given the number of witnesses located in Japan versus the witnesses located in the United States and the greater need for translation services if the litigation remains in this Court, it obviously will be less expensive to obtain attendance of witnesses and translation services if the lawsuit is litigated in Japan. Fluoroware, Inc. v. Dainichi Shoji K.K., 999 F. Supp. 1265, 1273 (D.Minn. 1991) (dismissing for forum non conveniens where many of witnesses were in Japan and it would be impossible or very expensive to obtain their attendance in Minnesota). Moreover, while some of Defendant's witnesses are employees and presumably would agree to come to the United States to testify if the litigation remained in this Court, many key witnesses, including the drivers of the cars involved in the 1995 accident and Plaintiff's physicians in Japan, are not employed by Defendant and Defendant would be unable to secure their testimony if the case remained in this Court. This factor also favors dismissing this case. Id.

Moreover, the bulk of the documents - all of the documents related to the 1995 car accident, Plaintiff's post-accident hospitalization, the insurance policy issued by Defendant, the Defendant's claim file, and the litigation and settlement in Ito v. Onizuka - are located in Japan and written in Japanese. Plaintiff does have some documents - her medical records for treatment she received in the United States and her financial records - located in the United States and written in English. Because the majority of documents are located in Japan

and written in Japanese, it will be less expensive to transport and translate the smaller number of English language documents located in the United States. See, Mars Inc. v. Kabushiki-Kaisha Nippon Conlux, 24 F.3d 1368, 1375 (Fed. Cir. 1994) (complication of "having to agree on the proper translation of [Japanese] laws, documents and other communications" supported dismissal).

Plaintiff attempts to limit the number of witnesses and documents from Japan that are relevant to her case by arguing that her claims only arise out of the conduct of Defendant after August 21, 1997 in refusing to pay for Plaintiff s medical treatment in the United States. However, to determine if Defendant is required to pay for Plaintiff's medical treatment and if the medical treatment Plaintiff received in the United States was necessary in relation to injuries she received in the 1995 car accident, it will be necessary far the Court to examine the events prior to August 21, 1997 and the litigation and settlement of Ita v. Onizuka. The events prior #o August 21, 1997 and Ito v. Onizuka all took place in Japan and the witnesses and documents relating to those events are located in Japan. Plaintiff tacitly acknowledges the relevance of the pre-August 21, 1997 events by devoting approximately fifty paragraphs of her Complaint to those events. If the pre-August 21, 1997 events were irrelevant to Plaintiff's case, such a lengthy exposition of them in her Complaint would be unnecessary.

Accordingly, the private interest factors strongly favor dismissal. Creative Technology, 61 F.3d at 703; Murray v. British Broadcasting Corp., 84 F.3d 287, 293 (2d Cir. 1996) (in action alleging copyright infringement

arising out of parties' contractual relationship in England, most of witnesses and physical and documentary evidence located in England and, therefore, private interests favored dismissal); Blanco v. Banco Industrial de Venezuela, 997 F.2d 974, 983-84 (2d Cir. 1993) (in contract dispute arising out of project in Venezuela, private interest factors strongly favor dismissal when most witnesses and physical and documentary evidence located in foreign forum).

2. The Public Interest Factors.

Courts also balance public interest factors to determine if they weigh in favor of dismissal. These factors include (1) administrative difficulties flowing from court congestion;[6] (2) local interest of lawsuit; (3) the court's familiarity with governing law; (4) burden on local courts and juries; and (5) the costs of resolving a dispute unrelated to this forum. Lueck, 236 F.3d at 1147 (citing Piper Aircraft, 454 U.S. at 259-61, and Gulf Oil, 330 U.S. at 508-09). These factors also weigh in favor of dismissal.

"Jury duty is a burden that ought not to be imposed upon the people of a community which has no relation to the litigation." Baumgart v. Fairchild Aircraft Corp., 981 F.2d 824, 828 (5th Cir.), cert. denied 508 U.S. 973 (1993) (upholding determination that Germany had greater interest in ensuring that its citizens were compensated for injuries arising out of plane crash in Germany than did Texas in potential liability of Texas manufacturers for allegedly defective product manufactured in Texas). Moreover, all localities have an interest in having localized controversies decided in their own forum. Howe v. Goldcorp Investments,

Ltd., 946 F.2d 944, 953 (1st Cir. 1991) (except for American plaintiff, case had little to do with United States and Canada had greater interest in acting as forum for litigation arising out of alleged misrepresentations made in Canada by Canadian corporation).

This case involves a car accident in Japan, where both drivers were Japanese citizens with Japanese automobile insurance issued by Japanese companies, including Defendant. Plaintiff, an American citizen and passenger in one of the cars involved in the accident, received emergency medical care and, for approximately nine months, was hospitalized in Japan for her injuries from the car accident. All of the medical care received by Plaintiff in Japan was paid for by Defendant, a Japanese corporation. Subsequently, Plaintiff sued, and later settled with, the drivers of the cars involved in the accident in Tokyo District Court. Defendant, as one of the insurers of one of the drivers, intervened in the litigation in Japan and was included in the Articles of Settlement of the litigation. As discussed above, Plaintiff's attempt to separate the events in Japan from what she claims is at issue in this case - the payment for her medical treatment here in the United States - is unpersuasive. Whether the medical treatment in the United States relates to the injuries Plaintiff received in the car accident in Japan and whether Defendant is obligated to pay for that medical treatment are issues directly related to the events in Japan -- namely, the car accident, the medical treatment received in Japan, Defendant's obligations to Plaintiff under the insurance policy, the settlement in the Japanese litigation, and any promises made to Plaintiff by Defendant. In this case, there is little or no United

States' interest outside of the American plaintiff. Therefore, it would be unfair to burden this Court and its jurors with the costs of litigating a case that is primarily of interest to Japan. Creative Technology, 61 F.3d at 704 ("the United States' interest . . . and the relation of the jury community to this controversy are extremely attenuated" despite presence of parties' American subsidiaries that distribute contested product in the United States).

When a diversity case is governed by foreign law, courts frequently dismiss the case and allow it to proceed in the foreign form. See Piper Aircraft, 454 U.S. at 260 ("[T]he need to apply foreign law point[s] towards dismissal"). In this diversity case, while the Court need not, and does not, decide the choice-of-law issue, it is clear Japanese law will need to be applied, at a minimum, with respect to the settlement of Ito v. Onizuka and the applicability, if any, of Japan's Automobile Accident Compensation Law to the facts of this case.[7] See Declaration of Hioshi Nakane, Esq., Pars. 4-9. Because Japanese courts are more competent at interpreting and applying Japanese law, this factor weighs in favor of dismissal. Blanco, 997 F.2d at 988 (district court entitled to conclude that "questions of Venezuelan substantive and procedural law are better addressed by Venezuelan courts"). Accordingly, the public interest factors favor dismissal. Id.

IV. Conclusion

Because Japan is an adequate alternative forum and the public and private interest factors favor dismissal, Defendants' Motion is GRANTED.

IT IS SO ORDERED.

The Clerk shall serve a copy of this Minute Order on all parties to this action.

Footnote(s)

fn1 Moreover, Defendant has agreed to submit to the jurisdiction of the District Court in Japan in this case. Motion to Dismiss for Forum Non Conveniens, p. 7.

fn2As Defendant points out in its Reply, California also no longer recognizes a cause of action for third party insurance bad faith. See, Moradi-Shalal v. Fireman's Fund Ins. Co., 46 Cal. 3d 287, 304-05 (1988) (no implied right of action for third party under California Insurance Code § 790.03(h)). Therefore, to the extent Plaintiff's first claim for relief is a third party bad faith claim, Plaintiff will not be able to maintain her first claim for relief in this Court either.

fn3 Moreover, Japan has already been shown to be an adequate forum in this case. Plaintiff has already litigated certain of her claims arising out of the 1995 car accident in Japan.

fn4 Because Plaintiff has already litigated and settled same of her claims arising from the 1995 car accident in a Japanese court, this factor is obviously not an issue, nor is it raised as one by Plaintiff in her Opposition.

fn5 Plaintiff concludes that she has "scores" of friends and service providers located in the United States that will be witnesses, but she does not identify these individuals or explain how their testimony would be relevant to her case. Based on the limited information

the Court has about Plaintiff's potential witnesses, the Court cannot find that Plaintiff will suffer undue prejudice by litigating this case in Japan.

fn6 While the parties have not given the Court any information about the docket congestion of the Tokyo District Court, this Court notes that it is widely and frequently acknowledged that the Central District of California is one of the busiest and most burdened federal courts in this country.

fn7A choice of law determination must be made before a case can be dismissed on forum non conveniens grounds if the case involves a United States statute requiring venue in the United States, such as the Jones Act or the Federal Employers' Liability Act. Lueck, 236 F.3d at 1148. However, because no statute requiring venue in the United States arguably applies in this case, "no potentially dispositive choice of law determination need [be] made." Id. (citing Lockman Foundation, 930 F.2d at 771).

Filed 3/16/2006
No. 04-55145

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

YUMI ITO, an individual on behalf of herself and on behalf of the People of the State of California (for the benefit of the Internal Revenue Service and the California Franchise Tax Board),
Plaintiff - Appellant,

v.

TOKIO MARINE & FIRE INSURANCE COMPANY, LTD., a corporation,
Defendant - Appellee.

ORDER

JUDGES: Before: HUG, SILER*, and WARDLAW, Circuit Judges.

The panel has voted to deny Appellee's petition for panel rehearing. The petition for rehearing is DENIED.

Footnote

* The Honorable Eugene E. Siler, Jr., Senior United States Circuit Judge for the Sixth Circuit, sitting by designation.

RELEVANT PROVISIONS INVOLVED

CALIFORNIA INSURANCE CODE

§700. (a) A person shall not transact any class of insurance business in this state without first being admitted for that class. Admission is secured by procuring a certificate of authority from the commissioner. The certificate shall not be granted until the applicant conforms to the requirements of this code and of the laws of this state prerequisite to its issue.

§790. The purpose of this article is to regulate trade practices in the business of insurance in accordance with the intent of Congress as expressed in the Act of Congress of March 9, 1945 (Public Law 15, Seventy-ninth Congress), by defining, or providing for the determination of, all such practices in this State which constitute unfair methods of competition or unfair or deceptive acts or practices and by prohibiting the trade practices so defined or determined.

§790.02. No person shall engage in this State in any trade practice which is defined in this article as, or determined pursuant to this article to be, an unfair method of competition or an unfair or deceptive act or practice in the business of insurance.

§1861.13. Application. This article shall apply to all insurance on risks or on operations in this state, except those listed in Section 1851.

McCarran-Ferguson Act, 15 U.S.C. § 1011 - 1015.

§ 1011. Declaration of policy

The Congress hereby declares that the continued regulation and taxation by the several States of the business of insurance is in the public interest, and that silence on the part of the Congress shall not be construed to impose any barrier to the regulation or taxation of such business by the several States.

§ 1012. Regulation by State law; Federal law relating specifically to insurance; applicability of certain Federal laws after June 30, 1948

(a) State regulation. The business of insurance, and every person engaged therein, shall be subject to the laws of the several States which relate to the regulation or taxation of such business.

(b) Federal regulation. No Act of Congress shall be construed to invalidate, impair, or supersede any law enacted by any State for the purpose of regulating the business of insurance, or which imposes a fee or tax upon such business, unless such Act specifically relates to the business of insurance: Provided, That after June 30, 1948, the Act of July 2, 1890, as amended, known as the Sherman Act [15 USCS §§ 1 et seq.], and the Act of October 15, 1914, as amended, known as the Clayton Act, and the Act of September 26, 1914, known as the Federal Trade Commission Act, as amended [15 USCS §§ 41 et seq.], shall be applicable to the business of insurance to the extent that such business is not regulated by State law.

§ 1013. Suspension until June 30, 1948, of application of certain Federal laws; Sherman Act [15 USCS § 1 et seq.] applicable to agreements to, or acts of, boycott, coercion, or intimidation

(a) Until June 30, 1948, the Act of July 2, 1890, as amended, known as the Sherman Act [15 USCS §§ 1 et seq.], and the Act of October 15, 1914, as amended, known as the Clayton Act and the Act of September 26, 1914, known as the Federal Trade Commission Act, as amended [15 USCS §§ 41 et seq.], and the Act of June 19, 1936, known as the Robinson-Patman Antidiscrimination Act, shall not apply to the business of insurance or to acts in the conduct thereof.

(b) Nothing contained in this Act [15 USCS §§ 1011 et seq.] shall render the said Sherman Act [15 USCS §§ 1 et seq.] inapplicable to any agreement to boycott, coerce, or intimidate, or act of boycott, coercion, or intimidation.

§ 1014. Applicability of National Labor Relations Act [29 USCS §§ 151 et seq.] and the Fair Labor Standards Act of 1938

Nothing contained in this Act [15 USCS §§ 1011 et seq.] shall be construed to affect in any manner the application to the business of insurance of the Act of July 5, 1935, as amended, known as the National Labor Relations Act [29 USCS §§ 151 et seq.], or the Act of June 25, 1938, as amended, known as the Fair Labor Standards Act of 1938, or the Act of June 5, 1920, known as the Merchant Marine Act, 1920.

§ 1015. Definition of "State"

As used in this Act [15 USCS §§ 1011 et seq.], the term "State" includes the several States, Alaska, Hawaii, Puerto Rico, Guam, and the District of Columbia.

Supreme Court, U.S.
FILED
OCT 1 3 2006
OFFICE OF THE CLERK

(2)

No. 05-1598

IN THE
Supreme Court of the United States

THE TOKIO MARINE & FIRE INSURANCE COMPANY, LTD., A CORPORATION,

Petitioner,

v.

YUMI ITO, AN INDIVIDUAL ON BEHALF OF HERSELF AND ON BEHALF OF THE PEOPLE OF THE STATE OF CALIFORNIA,

Respondent.

On Petition for a Writ of Certiorari to the
United States Court of Appeals for the Ninth Circuit

RESPONDENT'S BRIEF IN OPPOSITION

JENNIFER SOBLE
BRIAN WOLFMAN
PUBLIC CITIZEN
LITIGATION GROUP
1600 20th Street, NW
Washington, DC 20009
(202) 588-1000

ROBERT P. BECKHAM, III
Counsel of Record
HORGAN, ROSEN, BECKHAM
& COREN, L.L.P.
23975 Park Sorrento, Ste 200
Calabasas, CA 91302
(818) 591-2121

Counsel for Respondent

October 2006

QUESTION PRESENTED

Should this Court grant review to reevaluate the Court of Appeals' balancing of the private and public interest factors on Petitioner's motion to dismiss for forum non conveniens in favor of a United States citizen's choice of forum because the focal point of the plaintiff's breach of contract, breach of implied covenant of good faith and fair dealing, and fraud claims was California, and not Japan?

TABLE OF CONTENTS

QUESTION PRESENTED i

TABLE OF AUTHORITIES iv

STATEMENT OF THE CASE 1

REASONS FOR DENYING THE WRIT 3

A. **The Court of Appeals' Analysis Is Consistent With Those Of Other Circuits And The Petition For Writ Of Certiorari Should Be Denied.** 3

1. *The Ninth Circuit's Determination That The District Court Abused Its Discretion Is Consistent With The Holdings Of Every Other Circuit.* 4

2. *In Balancing The* Gilbert *Factors, The Ninth Circuit Accorded Proper Weight To The Access To Evidence For Both Parties, Among The Other Relevant Factors.* 6

B. **The Ninth Circuit Followed Well Established Law In Evaluating The Relevance of Witness Testimony And Did Not Create Any Public Policy Concerns.** 8

1. *The Courts Have Established A Flexible Standard In Applying The* Gilbert *Factors, Which Was Followed*

By The Ninth Circuit. 10

2. *The Forum Non Conveniens Analysis Is Fact-Intensive, And The Balancing Of Facts Was Properly Evaluated By The Ninth Circuit.* 12

C. **The Ninth Circuit Accorded Appropriate Weight To Principles Of Comity In Evaluating The Public Interest Factors.** 13

CONCLUSION 15

TABLE OF AUTHORITIES

CASES

In re Air Crash Disaster Near New Orleans, La. On July 9, 1982,
821 F.2d 1147 (5th Cir. 1987) 11

Alnwick v. European Micro Holdings, Inc.,
29 F. App'x 781 (2d Cir. 2002) 13

DiRienzo v. Philip Services Corp,
294 F.3d 21 (2d Cir. 2002) 5

Duha v. Agrium,
448 F.3d 867 (6th Cir. 2006) 4, 7, 9

In re Ford Motor Co., Bridgestone/Firestone North America Tire, LLC,
344 F.3d 648 (7th Cir. 2003) 4

Gross v. British Broadcasting Corp.,
386 F.3d 224 (2d Cir. 2004) 7

Gschwind v. Cessna Aircraft Co.,
161 F.3d 602 (10th Cir. 1998) 11

Gschwind v. Cessna Aircraft Co.,
No. 97-3164, 1998 WL 654174 (10th Cir. Sept. 18, 1998) 7

Guidi v. Inter-Continental Hotels Corp.,
224 F.3d 142 (2d Cir. 2000) 5

Gulf Oil Corp. v. Gilbert,
330 U.S. 501 (1947) 3, 6, 7

Howe v. Goldcorp Investments, Ltd.,
946 F.2d 944 (1st Cir. 1991) 12

Kontoulas v. A.H. Robins Co., Inc.,
745 F.2d 312 (4th Cir. 1984) 5

Koster v. Lumbermens Mutual Casualty Co.,
330 U.S. 518 (1947) 3, 4

Lacey v. Cessna Aircraft Co.,
862 F.2d 38 (3d Cir. 1988) 11

Lockman Foundation v. Evangelical Alliance Mission,
930 F.2d 764 (9th Cir. 1991) 7

Lony v. E.I. Du Pont de Nemours & Co.,
935 F.2d 604 (3d Cir. 1991) 7

Lony v. E.I. Du Pont de Nemours & Co.,
886 F.2d 628 (3d Cir. 1989) 5

McLennan v. America Eurocopter Corp., Inc.,
245 F.3d 403 (5th Cir. 2001) 4

Miskow v. Boeing Co.,
664 F.2d 205 (9th Cir. 1981) 15

Nowak v. Tak How Investments, Ltd.,
94 F.3d 708 (1st Cir. 1996) 5

Overseas Programming Co., Ltd. v. Cinematographische Commerz-Anstalt,
684 F.2d 232 (2d Cir. 1982) 5

Pain v. United Techologies Corp.,
637 F.2d 775 (D.C. Cir. 1980) 5

Piper Aircraft v. Reyno,
454 U.S. 235 (1981) 3, 7, 9, 10, 11, 12

Quintero v. Klaveness Ship Lines,
914 F.2d 717 (5th Cir. 1990) 7

R. Maganlal & Co. v. M.G. Chemical Co., Inc.,
942 F.2d 164 (2d Cir. 1991) 5

Reid-Walen v. Hansen,
933 F.2d 1390 (8th Cir. 1991) 5, 7, 9, 11

Rivendell Forest Products, Ltd. v. Canadian Pacific Ltd.,
2 F.3d 990 (10th Cir. 1993) 5, 11

Royal Bed & Spring Co., Inc. v. Famossul Industria e Comercio de Moveis Ltda.,
906 F.2d 45 (1st Cir. 1990) 7

Satz v. McDonnell Douglas Corp.,
244 F.3d 1279 (11th Cir. 2001) 4

Sigalas v. Lido Maritime, Inc.,
776 F.2d 1512 (11th Cir. 1985) 9

SME Racks, Inc. v. Sistemas Mecanicos Para Electronica, S.A.
382 F.3d 1097 (11th Cir. 2004) 7

State Farm Automobile Insurance v. Campbell,
538 U.S. 408 (2003) 14

Van Cauwenberghe v. Biard,
486 U.S. 517 (1988) 11

RULES AND STATUTES

28 U.S.C. § 1332 2

28 U.S.C. § 1441 2

S. Ct. R. 10 ..... 13, 14

STATEMENT OF THE CASE

In September 1995, respondent Yumi Ito, an American citizen and a resident of California, was severely injured as a passenger in a car accident. The accident took place in Japan, and was caused by a driver insured by petitioner Tokio Marine and Fire Casualty. During the course of her recovery in Japan, Ms. Ito was forced to return to the United States several times at Tokio Marine's expense, because her temporary visa repeatedly expired. Because her frequent trips to the United States proved costly for Tokio Marine, it sought to enter into an arrangement under which Ms. Ito would complete her recovery and rehabilitation in the United States. Pet. App. 8-9a.

In July 1996, while Ms. Ito was in the United States, Tokio Marine offered to pay Ms. Ito's medical expenses and her lost income, as well as a daily living allowance, but only on the condition that Ms. Ito complete her recovery and rehabilitation in the United States. Ms. Ito agreed, and thereafter located physicians in California who treated her extensive injuries. Ms. Ito's doctors and medical records from 1996 until the present are located in California, as is evidence of her lost income. *Id.*

Tokio Marine paid Ms. Ito's expenses as agreed through August 1997. In September 1997, Tokio Marine discontinued payments to Ms. Ito, citing a variety of discrepancies regarding Ms. Ito's medical care and lost income, as well as alleged concerns about the competence of her physicians in California. During this time, Tokio Marine continually reassured Ms. Ito that it would reimburse her for these costs, as soon as the discrepancies were resolved. Pet. App. 9a.

In 2000, Ms. Ito took steps to file a lawsuit in Japan against Onizuka and Sasaki, the drivers in the 1995 accident. A settlement agreement was entered into in 2002. The

settlement agreement resolved all of Ms. Ito's claims arising out of the accident itself, but did not purport to settle Ms. Ito's claims arising out of Tokio Marine's violation of the 1996 agreement. Pet. App. 9a.

In October 2003, Ms. Ito sued Tokio Marine in California state court, alleging claims for breach of contract, breach of the implied covenant of good faith and fair dealing, fraud, novation, and bad faith. Pet. App. 8a. Ms. Ito sought injunctive relief and damages. Tokio Marine removed Ms. Ito's complaint to the United States District Court for the Central District of California (the "District Court") on the basis of diversity jurisdiction. *See* 28 U.S.C. §§ 1441(a), 1332(a)(1).

Each of the claims alleged in the complaint filed in October 2003 centers on Tokio Marine's failure, under the 1996 agreement, to pay the expenses Ms. Ito incurred in California. These claims do not relate to the earlier car accident.

In the District Court, Tokio Marine moved to dismiss Ms. Ito's complaint based on forum non conveniens. Due to its misunderstanding of Ms. Ito's claims, and without giving any deference to Ms. Ito's choice of forum, the District Court granted Tokio Marine's motion to dismiss. Pet. App. 17a. Ms. Ito appealed the District Court's order to the Ninth Circuit, which reversed. Pet. App. 2a. The Ninth Circuit denied Tokio Marine's petition for rehearing. Pet. App. 20a.

REASONS FOR DENYING THE WRIT

The Petition poses only one question: whether the decision of the Ninth Circuit conflicts with decisions of other circuits. The three areas of claimed conflict are: (1) standard of proof; (2) public policy; and (3) concerns of comity. In fact, Petitioner does not cite any actual conflict, but instead merely raises questions about the Ninth Circuit's application of properly stated rules of law. Petitioner's assertions do not warrant a grant of a writ of certiorari, and thus the Petitioner's request should be denied.

A. The Court Of Appeals' Analysis Is Consistent With Those Of Other Circuits And The Petition For Writ Of Certiorari Should Be Denied.

In reviewing the District Court's order dismissing Ms. Ito's complaint for forum non conveniens, the Court of Appeals properly applied the settled standards under which all courts of appeals review a district court's ruling on a motion to dismiss for forum non conveniens. First, the Court of Appeals correctly identified two distinct errors with the District Court's ruling– the District Court failed to place the burden of proof on Tokio Marine, and it misapprehended the nature of Ms. Ito's claims. The Court of Appeals' conclusion that both errors amounted to an abuse of discretion is entirely consistent with opinions from the other courts of appeals. Then, the Court of Appeals evaluated Tokio Marine's motion to dismiss for forum non conveniens. In so doing, the Court of Appeals correctly applied the factors set forth in *Gulf Oil Corporation v. Gilbert*, 330 U.S. 501 (1947), and the burden of proof established in *Koster v. Lumbermens Mutual Casualty Company*, 330 U.S. 518 (1947). *See Piper Aircraft v. Reyno*, 454 U.S. 235, 257-60 (1981)

(applying *Gilbert* and *Koster* to a forum non conveniens inquiry).

1. *The Ninth Circuit's Determination That The District Court Abused Its Discretion Is Consistent With The Holdings Of Every Other Circuit.*

The Court of Appeals identified two errors in the District Court's analysis that undermined the District Court's ability to properly engage in the forum non conveniens inquiry.

First, the Court of Appeals determined that the District Court failed to place the burden of proving forum non conveniens on the moving party. This Court has held that the moving party bears the burden of making a "clear showing" of facts that "either (1) establish such oppressiveness and vexation to a defendant as to be out of all proportion to plaintiff's convenience, which may be shown to be slight or nonexistent, or (2) make trial in the chosen forum inappropriate because of considerations affecting the court's own administrative and legal problems." *Koster*, 330 U.S. at 524. Not surprisingly, every court of appeals that has considered the question, including the Ninth Circuit, has followed this Court's holding in *Koster* and has placed the burden of proof on the moving party.[1] Petitioner does not dispute this rule of law, but only its

---

[1] *See Duha v. Agrium*, 448 F.3d 867, 874 (6th Cir. 2006); *In re Ford Motor Co., Bridgestone/Firestone N. Am. Tire, LLC*, 344 F.3d 648, 652 (7th Cir. 2003); *McLennan v. Am. Eurocopter Corp., Inc.*, 245 F.3d 403, 424 (5th Cir. 2001); *Satz v. McDonnell Douglas Corp.*, 244 F.3d 1279, 1282 (11th Cir.

(continued...)

application to the facts of this case, which does not warrant granting the writ.

Second, the Court of Appeals determined that the District Court abused its discretion because it misapprehended the nature of the claims before it. The Second Circuit is the only other circuit that has reviewed a district court's order on a motion to dismiss where the lower court has misconstrued the nature of the plaintiff's claim. In a line of cases consistent with the Court of Appeals' opinion in this case, the Second Circuit has repeatedly held that when a district court dismisses for forum non conveniens based on a fundamental misunderstanding of the underlying facts of the case, reversal is warranted. *See DiRienzo v. Philip Servs. Corp*, 294 F.3d 21, 33 (2d Cir. 2002) ("Because the *Gilbert* test is so fact-specific, a district court's erroneous understanding of facts central to a case can preclude a reasonable balancing of the *Gilbert* factors and form the basis for reversal on appeal."); *R. Maganlal & Co. v. M.G. Chem. Co., Inc.*, 942 F.2d 164, 168 (2d Cir. 1991) (holding that the district court abused its discretion in balancing the *Gilbert* factors because that court misunderstood the nature of plaintiff's complaint); *Overseas Programming Co., Ltd. v.*

---

[1](...continued)
2001); *Guidi v. Inter-Continental Hotels Corp.*, 224 F.3d 142, 146 (2d Cir. 2000); *Nowak v. Tak How Investments, Ltd.*, 94 F.3d 708, 719 (1st Cir. 1996); *Rivendell Forest Prods., Ltd. v. Canadian Pac. Ltd.*, 2 F.3d 990, 993 (10th Cir. 1993); *Reid-Walen v. Hansen*, 933 F.2d 1390, 1394 (8th Cir. 1991); *Lony v. E.I. Du Pont de Nemours & Co.*, 886 F.2d 628, 632 (3d Cir. 1989); *Kontoulas v. A.H. Robins Co., Inc.*, 745 F.2d 312, 316 (4th Cir. 1984); *Pain v. United Tech. Corp.*, 637 F.2d 775, 784 (D.C. Cir. 1980).

Cinematographische Commerz-Anstalt, 684 F.2d 232, 235 (2d Cir. 1982) (reversing because the district court "failed to identify the basic issue in the lawsuit").

The Court of Appeals' holding is consistent with those Second Circuit opinions. No other circuit has disapproved of the Second Circuit's line of cases. Because there is no split of authority as to whether a district court abuses its authority when it balances the *Gilbert* factors based on a misreading of the plaintiff's claim, this Court should deny Petitioner's request for certiorari.

2. *In Balancing The* Gilbert *Factors, The Ninth Circuit Accorded Proper Weight To The Access To Evidence For Both Parties, Among The Other Relevant Factors.*

The Court of Appeals' balancing of the *Gilbert* factors does not depart from the consistent decisions of the other courts of appeals. Under *Gilbert*, a court faced with a motion to dismiss for forum non conveniens must balance both private and public factors. These private factors include the relative ease of access to sources of proof, the availability of compulsory process for attendance of unwilling witnesses, the cost of obtaining attendance of willing witnesses, the possibility of viewing the premises, the enforceability of judgment, and the relative advantages and obstacles to a fair trial. *Gilbert*, 330 U.S. at 508. The public interest factors a court should consider include the administrative difficulties from congestion when litigation is not handled at its origin, the imposition of jury duty on a community that has no relation to the litigation, local interest in having localized controversies decided at home, and the benefit of resolving cases in a forum that is familiar with the

governing law. *Id.* at 508-09. Dismissal for forum non conveniens should only be granted if the balance is "strongly in favor of the defendant." *Id.* at 508.

The Court of Appeals properly gave deference to Ms. Ito's choice to sue in her home forum, which the District Court failed to do. Pet. App. 3a (citing *Piper Aircraft*, 454 U.S. at 255). Every court of appeals to consider the question has agreed that a plaintiff's choice to sue in her home forum is entitled to significant deference.[2] The Court of Appeals' conclusion that the District Court abused its discretion in failing to accord proper deference to Ms. Ito's choice of home forum, and its reweighing of factors to give proper deference to Ms. Ito's choice, is thus consistent with the holdings of the other courts of appeals, as well as this Court's opinions in *Gilbert* and *Koster*.

---

[2]*See Duha*, 448 F.3d at 873-74; *Gross v. British Broadcasting Corp.*, 386 F.3d 224, 231 (2d Cir. 2004); *SME Racks, Inc. v. Sistemas Mecanicos Para Electronica, S.A.*, 382 F.3d 1097, 1106 (11th Cir. 2004); *Lony v. E.I. Du Pont de Nemours & Co.*, 935 F.2d 604, 609 (3d Cir. 1991); *Reid-Walen*, 933 F.2d at 1394-95; *Lockman Found. v. Evangelical Alliance Mission*, 930 F.2d 764, 767 (9th Cir. 1991); *Quintero v. Klaveness Ship Lines*, 914 F.2d 717, 727 (5th Cir. 1990); *Royal Bed & Spring Co., Inc. v. Famossul Industria e Comercio de Moveis Ltda.*, 906 F.2d 45, 52 (1st Cir. 1990); *Gschwind v. Cessna Aircraft Co.*, No. 97-3164, 1998 WL 654174, at *2 (10th Cir. Sept. 18, 1998).

B. The Ninth Circuit Followed Well Established Law In Evaluating The Relevance Of Witness Testimony And Did Not Create Any Public Policy Concerns.

Petitioner argues that dismissal for forum non conveniens is necessary because any litigation of Ms. Ito's claims will require testimony and evidence relating to the 1995 accident, and thus asserts that the Court of Appeals opinion "reflects that it disregarded the element of access to evidence as a private interest factor." Pet. at 5. Not so. A close reading of the Court of Appeals' opinion indicates that it explicitly considered access to evidence when balancing the *Gilbert* factors, but held that this factor did not weigh in favor of dismissal, because Tokio Marine failed to present *any* evidence to the district court that documents and records located in Japan are relevant to resolving Ms. Ito's claims. For example, although Tokio Marine stresses that the witnesses to the 1995 accident are located in Japan, there is no reason that their testimony would be material to whether Tokio Marine violated the 1996 agreement.

To the contrary, the vast majority of relevant evidence is located in the United States. Tokio Marine and Ms. Ito entered into the 1996 agreement while Ms. Ito was located in the United States. Her treating physicians, medical records, and proof of lost income, all of which will be relevant to a damages determination, are located in the United States. In light of Tokio Marine's claims that Ms. Ito's California-based physicians were unqualified, evidence of their treatment of Ms. Ito's injuries — which is, of course, located in California — will be vital to the resolution of Ms. Ito's claims. All of the records of her medical treatment and lost wages are in English. Given that litigation in Ms. Ito's home forum will give the

parties access to the vast majority of the relevant evidence, and that Ms. Ito's claims flow from Tokio Marine's refusal to fulfill its obligations under the 1996 agreement, as opposed to the accident itself, Petitioner is incorrect that a significant portion of the relevant evidence is located in Japan.

Petitioner also argues that the Court of Appeals' opinion is a rejection of *Piper Aircraft*'s holding that a moving party is not required to supply the court with detailed proffers of potential witnesses' testimony. This assertion misconstrues the holding in *Piper Aircraft*. *Piper Aircraft* reaffirmed that the moving party must show that litigation in the United States would deny the parties access to "crucial witnesses." In holding that the proper inquiry examines not only the location, but also the materiality and relevance of potential evidence, the Court of Appeals' opinion is entirely consistent with *Piper Aircraft*'s holding that dismissal is appropriate where "many *crucial* witnesses are located beyond the reach of compulsory process." *Piper Aircraft*, 454 U.S. at 258 (emphasis added). It is also consistent with the opinion of every circuit to consider whether the *Gilbert* factors require inquiry into the location of relevant evidence. These courts have sensibly held that, in some cases, it is insufficient simply to tally the number of witnesses and documents that are located in the foreign jurisdiction. Rather, district courts must examine the materiality and importance of the anticipated evidence. *Duha,* 448 F.3d at 877 ("[T]he weighing of the costs of witness attendance should . . . focus on witnesses whose relevance has been established by record evidence."); *Reid-Walen*, 933 F.2d at 1397 (noting that the defendants had not established that there were more "key witnesses" in the foreign forum); *Sigalas v. Lido Maritime, Inc.*, 776 F.2d 1512, 1520 (11th Cir. 1985) (considering not only the number of witnesses located in the foreign forum, but the significance of those witnesses to future litigation).

Tokio Marine further claims that the Court of Appeals' conclusion that Tokio Marine failed to meet its burden of showing that litigation in the United States would deprive the parties of access to evidence ignores *Piper Aircraft*'s concern that a moving party may be unable to make such a detailed showing with evidence located abroad. Contrary to Petitioner's argument, the Ninth Circuit opinion is entirely consistent with *Piper Aircraft* and reflects this Court's recognition that the amount of proof necessary to establish forum non conveniens will vary from case to case. *Piper Aircraft*, 454 U.S. at 258 (rejecting a *per se* rule requiring a specific level of detail to establish forum non conveniens). Both *Piper*, the Court of Appeals' decision, and the opinions of several other circuits hold that a *per se* rule is inappropriate given the fact-intensive nature of the forum non conveniens inquiry. The flexible standard with which the circuit courts evaluate whether the moving party has met its burden of proof, as well as the fact-intensive nature of the forum non conveniens inquiry, make review by this Court inappropriate.

1. *The Courts Have Established A Flexible Standard In Applying The* Gilbert *Factors, Which Was Followed By The Ninth Circuit.*

Courts have been reluctant to establish a hard and fast rule about the amount of proof a moving party must bring forth to meet its burden of proving that dismissal for forum non conveniens is appropriate. Recognizing that not every case will require the same showing to establish forum non conveniens, this Court has refrained from creating a *per se* rule that would automatically require detailed affidavits and other evidence of the *Gilbert* factors in every case. *Piper Aircraft*, 454 U.S. at 258. This Court emphasized, however, that the moving party

must provide enough information to allow the district court to balance the parties' interests. *Id.*; *see also Van Cauwenberghe v. Biard*, 486 U.S. 517, 528-29 (1988) (noting that in considering a motion to dismiss based on forum non conveniens, "the district court's inquiry does not necessarily require extensive investigation, and may be resolved on affidavits presented by the parties").

Other circuit courts have recognized that the amount of additional information the moving party must provide depends on the facts of a particular case. *Gschwind v. Cessna Aircraft Co.*, 161 F.3d 602, 609-10 (10th Cir. 1998); *Lacey v. Cessna Aircraft*, 862 F.2d 38, 44 (3d Cir. 1988); *In re Air Crash Disaster Near New Orleans, La. On July 9, 1982*, 821 F.2d 1147, 1165 n.28 (5th Cir. 1987), *vacated by* 490 U.S. 1032 (1989), *reinstated by* 883 F.2d 17 (5th Cir. 1989). The Court of Appeals' holding that Petitioner has failed to meet its burden does not conflict with any circuit court decision; no court has held that affidavits are never required for the moving party to meet its burden. Furthermore, several courts of appeals have held that dismissal for forum non conveniens is inappropriate when the moving party provides no evidence upon which its claim can be evaluated. *See Rivendell Forest Prods.*, 2 F.3d at 993 (holding that the moving party failed to meet its burden of proving that the evidence was located in the foreign forum when it "provided no evidence on the issue whatsoever"); *Reid-Walen*, 933 F.2d at 1396-97 (holding that the moving party, which provided no evidence to support its assertions, failed to meet its burden of proving that most of the witnesses and evidence were located in the foreign forum); *Lacey*, 862 F.2d at 44 (holding that, on the particular facts of the case, "defendants did not submit sufficient information to undertake the forum non conveniens analysis"). Rather than raising new policy concerns, this line of cases reflects the Court's reasoning in

Piper Aircraft. A moving party is required to provide enough information to enable the court to balance the parties' interests. *See Piper Aircraft*, 454 U.S. at 258-59.

2. *The Forum Non Conveniens Analysis Is Fact-Intensive, And The Balancing Of Facts Was Properly Evaluated By The Ninth Circuit.*

Finally, the Court of Appeals' opinion reflects the fact-intensive nature of the forum non conveniens inquiry. The Court of Appeals reversed the District Court because it disagreed with the lower court's characterization of the nature of Ms. Ito's claim. The Court of Appeals held that dismissal was inappropriate in this case because there was no showing that any of the relevant evidence is in Japan; California's interest outweighs Japan's interest in the litigation, given the nature of the claims; and Ms. Ito chose to sue in her home forum.

Petitioner cites *Howe v. Goldcorp Investments, Ltd.*, 946 F.2d 944 (1st Cir. 1991), in which the First Circuit affirmed a district court's order dismissing an action for forum non conveniens. *Goldcorp* underscores the degree to which the facts of a particular case affect the forum non conveniens analysis. In that case, the plaintiff was a shareholder of a foreign corporation that trades on a foreign stock exchange governed by foreign security law; here, Ms. Ito is a private individual who contracted with a foreign insurance company. In *Goldcorp*, the defendant had virtually no contact with the United States besides the mailing of documents to its shareholders; here, Ms. Ito returned to and sought medical care in the United States at Tokio Marine's insistence. In *Goldcorp*,

all of the relevant evidence was located abroad; here, Petitioner has not demonstrated that the relevant evidence is abroad, and the nature of Ms. Ito's claims strongly suggests that most of the relevant evidence and witnesses are located in California.

The factual differences between this case and *Goldcorp* demonstrate that there is no inconsistency between the Ninth Circuit's opinion and the First Circuit's opinion in *Goldcorp*. In both cases, the courts of appeals properly reviewed the district courts' balancing of the *Gilbert* factors and considered whether the district court gave proper weight to each factor. No further consideration is necessary or desirable, and thus review should be denied. *See* S. Ct. R. 10.

C. The Ninth Circuit Accorded Appropriate Weight To Principles Of Comity In Evaluating The Public Interest Factors.

Petitioner also argues that the Court of Appeals disregarded Japan's interest in the litigation. To the contrary, the Court of Appeals explicitly considered Japan's interest in the litigation. Pet. App. 5a ("Japan may have some interest in protecting its corporate insurers . . . ."). The court expressly found, however, that California's interest outweighs Japan's, insofar as states have a strong interest in providing a forum for their residents who are injured. By giving greater weight to the interests of the plaintiff's home state when the plaintiff alleges fraud, among other things, the Court of Appeals' holding is consistent with that of the Second Circuit, which has held that a state has a great interest in protecting its citizens from fraud. *See, e.g., Alnwick v. Euro. Micro Holdings, Inc.*, 29 F. App'x 781, 784 (2d Cir. 2002). Contrary to Petitioner's characterization, California's interest in this case does not lie in the regulation of foreign insurance companies. Rather,

California has a strong interest in protecting its citizens from fraud and breach of contract, whether perpetrated on its citizens by foreign or domestic entities.

Furthermore, Petitioner's argument that comity required the District Court to refrain from exercising its jurisdiction is misplaced. First, Ms. Ito went to the United States at Tokio Marine's urging; exercising jurisdiction in this case does not unfairly burden Tokio Marine, which purposefully extended the reach of its conduct to the United States. Because Ms. Ito came to and sought medical care in the United States on Tokio Marine's direction, the comity concern addressed in *State Farm Automobile Insurance v. Campbell*, 538 U.S. 408, 421 (2003) — whether comity is offended when one jurisdiction punishes conduct occurring in another jurisdiction — is simply inapplicable here. Second, contrary to Tokio Marine's assertion, this case does not relate to the earlier Japanese lawsuit, which involved only Ms. Ito's claims relating directly to the 1995 accident.[3] Even if the Court of Appeals gave too little weight to Japan's interest in the litigation, that hypothetical error in balancing the *Gilbert* factors would not be grounds for review. *See* S. Ct. R. 10. ("A petition for a writ of

---

[3]Tokio Marine argues that, by its terms, the settlement reached in the Japanese litigation resolved all claims between Ms. Ito and Tokio Marine. Ms. Ito disagrees with that characterization of the settlement. In approving the settlement, the Japanese court stated that a California court must determine what, if any, preclusive effect the 2002 settlement would have on Ms. Ito's claims against Tokio Marine that arise out of the insurance company's violation of the 1996 agreement. Ninth Circuit Excerpts of Record 1-0207.

certiorari is rarely granted when the asserted error consists of . . . the misapplication of a properly stated rule of law.").

Finally, Petitioner challenges the Court of Appeals' citation to *Miskow v. Boeing Co.*, 664 F.2d 205 (9th Cir. 1981), because that decision predates *Piper Aircraft*. Like *Piper Aircraft*, however, *Miskow* simply acknowledges that dismissal for forum non conveniens is appropriate if, in light of private and public interests, the moving party has made a clear showing that litigation in the United States would either be (1) overly oppressive or vexatious to the moving party or (2) inconvenient because of administrative delay in the chosen forum. Both *Piper Aircraft* and *Miskow* recite the standards and factors set forth in *Gilbert* and *Koster*, and those opinions continue to provide the standards with which all courts review motions to dismiss based on forum non conveniens. *See* note 1, *supra*.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted,

Jennifer Soble
Brian Wolfman
Public Citizen
Litigation Group
1600 20th Street, NW
Washington, DC 20009
(202) 588-1000

Robert P. Beckham, III
Counsel of Record
Horgan, Rosen, Beckham
& Coren, L.L.P
23975 Park Sorrento, Ste 200
Calabasas, CA 91302
(818) 591-2121

Attorneys for Respondent

October 2006